



sustained a hearing loss or tinnitus due to employment factors.<sup>1</sup> The Board found a supplemental report was needed from the second opinion physician addressing the issue. The Board set aside Office decisions dated August 9, 2005 and January 13, 2006. In a July 6, 2007 decision, the Board again found that the case was not in posture for a decision as the supplemental report from the second opinion physician was speculative and equivocal.<sup>2</sup> The Board set aside the November 13, 2006 Office decision. The history of the case as contained in the Board's prior decisions, are incorporated herein by reference.

The Office referred appellant to Dr. Mohammad M. Akbar, a Board-certified otolaryngologist, for a second opinion evaluation on the issue of whether appellant's high frequency hearing loss or tinnitus were related to noise exposure at work in July 2004. On August 3, 2007 Dr. Akbar reviewed the medical evidence, finding on examination and results of diagnostic testing. He was unable to determine whether appellant's tinnitus was due to noise exposure from a fan with reasonable medical certainty. Dr. Akbar advised that appellant's hearing loss was mild and the tinnitus was only associated with the right ear. In an October 4, 2007 addendum, he reiterated that he could not determine whether appellant's tinnitus was a result of work exposure to any degree of medical certainty.

By decision dated October 16, 2007, the Office denied the claim for compensation on the grounds that the medical evidence did not establish an employment-related condition.

On November 4, 2007 appellant requested a review of the written record and resubmitted reports by Dr. Howard Melnick, an ear, nose and throat specialist, and Dr. James Restrepo, an otolaryngologist

By decision dated January 2, 2008, the Office hearing representative set aside the October 16, 2007 decision and remanded for further development. The Office hearing representative found that the reports of Dr. Akbar failed to resolve the issue of causal relation.

On February 8, 2008 the Office referred appellant to Daryl G. Bodner, a Board-certified otolaryngologist, for a second opinion evaluation on the issue of whether appellant's high frequency hearing loss or tinnitus were related to noise exposure at work in July 2004. In a March 23, 2008 report, Dr. Bodner stated that an MRI scan was normal and that he was unable to determine from the available information whether appellant's tinnitus was employment related. Based on appellant's history and placement of his desk near the sound of the fan, it was likely that this noise exposure was the cause of the hearing problem. In an April 11, 2008 supplemental report, Dr. Bodner reviewed the April 1, 2008 statement of accepted facts and advised that his opinion was unchanged.

By decision dated April 15, 2008, the Office denied the claim, finding that the medical evidence did not establish an employment-related condition.

---

<sup>1</sup> Docket No. 06-1132 (issued September 6, 2006). On July 19, 2004 appellant, then a 39-year-old social worker, filed a traumatic injury claim alleging that on July 16, 2004 he sustained ringing in the ears and a hearing loss when he was exposed to a loud "fly" fan for hours.

<sup>2</sup> Docket No. 07-801 (issued July 6, 2007).

On April 26, 2008 appellant requested a review of the written record by an Office hearing representative.

By decision dated July 1, 2008, an Office hearing representative set aside the April 15, 2008 decision and remanded the case for further development. The Office hearing representative found that Dr. Bodner's reports failed to resolve the issue of whether appellant's hearing loss was employment related.

On August 19, 2008 the Office referred appellant to Dr. William W. Banks, a Board-certified otolaryngologist, for a second opinion evaluation. In a November 14, 2008 report, Dr. Banks opined that "[g]iven temporal relationship of the noise exposure and the tinnitus development," he had to assume appellant's tinnitus was employment related. He noted that appellant had ear problems as a child which may have caused his ears to be more sensitive to acoustic trauma and developing the tinnitus. Dr. Banks related that appellant might have "had the hearing loss for a long period of time" so that his hearing loss was not caused by the noise, "but it did in fact cause enough trauma in the right ear to produce tinnitus in an already injured ear."

On December 3, 2008 the Office requested Dr. Banks to provide a supplemental report as he had failed to provide a well-rationalized opinion or discuss the 2004 medical evidence. He did not respond.

The Office subsequently referred appellant to Dr. Emil Liebman, a Board-certified otolaryngologist, for a second opinion evaluation on the issue. In a February 27, 2009 report, Dr. Liebman noted that appellant had some congestion and upper respiratory infection for the prior few days. An audiogram revealed high frequency sensorineural loss. As to whether appellant's tinnitus and hearing loss were employment related, Dr. Liebman opined that he could not provide a definite conclusion due to appellant's middle ear problem present on examination and the conductive component. He recommended repeat audiometric studies in four to six weeks.

On April 23, 2009 Dr. Liebman noted that appellant returned for a follow-up audiogram on April 17, 2009. He reported that there was no record of any hearing loss prior to appellant's noise exposure on July 16, 2004 and that appellant's tinnitus began at the time of his noise exposure. Dr. Liebman advised that he was unable to determine whether appellant's high frequency loss was due to his noise exposure, but that "there is a cause for the relationship with the tinnitus problem."

In a decision dated April 30, 2009, the Office denied the claim on the grounds that the medical evidence did not establish an employment-related condition.

On May 15, 2009 appellant requested a written review of the record by an Office hearing representative.

By decision dated September 29, 2009, an Office hearing representative affirmed the April 30, 2009 decision.

## LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> has the burden to establish the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.<sup>5</sup>

To establish a causal relationship between appellant's bilateral hearing loss and his employment, he must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's condition and the implicated employment factors.<sup>6</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup>

## ANALYSIS

Appellant filed an occupational disease claim alleging that his tinnitus and hearing loss were causally related to exposure to noise from a fan in July 2006. The Board previously remanded the case for development of the medical evidence. The issue is whether the employment factors identified by appellant caused his tinnitus or hearing loss.

The Office referred appellant to four Board-certified otolaryngologists following the Board's remand. Drs. Akbar and Bodner related that they were unable to provide a definitive answer as to whether appellant's tinnitus and hearing loss were causally related to his July 2004 noise exposure. Thereafter, Dr. Banks stated that he assumed a causal relationship based on the development of appellant's tinnitus and temporal relationship to noise exposure. The Office requested Dr. Banks to provide a supplemental report but there was no response. Dr. Liebman

---

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Barbara R. Middleton*, 56 ECAB 634 (2005).

<sup>5</sup> *Donald W. Wenzel*, 56 ECAB 390 (2005).

<sup>6</sup> *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>7</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Gloria J. McPherson*, 51 ECAB 441 (2000).

was then requested to resolve the issue of whether appellant's tinnitus and hearing loss were employment related.<sup>8</sup>

Dr. Liebman examined appellant and recommended additional diagnostic testing noting he was unable to provide a definite opinion on causal relation. He subsequently noted that physical examination of the middle ear was clear and audiometric studies obtained. Dr. Liebman noted, however, that as previously stated, "I cannot report with any degree of medical certainty that any or all of the high frequency loss is secondary to his noise exposure. The tinnitus however seems to be related in time of onset to the noise exposure." The Board finds that Dr. Liebman's opinion regarding the cause of appellant's hearing loss to be speculative and equivocal and of diminished probative value.<sup>9</sup> When the Office obtains an opinion from an Office referral physician, it has the responsibility to obtain an evaluation from the referral physician that resolves the issue involved in the case.<sup>10</sup> Dr. Liebman does not resolve the issue of causal relationship. The Office should not have relied upon his opinion as a basis for denying appellant's claim for compensation.<sup>11</sup> The case will be remanded to the Office for appropriate development on whether appellant's hearing loss or tinnitus is causally related to his federal employment. After such development as deemed necessary, a *de novo* decision shall be issued.

### **CONCLUSION**

The Board finds that this case is not in posture for a decision.

---

<sup>8</sup> See *Peter C. Belkind*, 56 ECAB 580 (2005) (where the Office referred a claimant for a second opinion physician and the report did not adequately address the relevant issues, the Office should secure a report on the relevant issues).

<sup>9</sup> *D.D.*, 57 ECAB 734 (2006); *Michael R. Shaffer*, 55 ECAB 386 (2004).

<sup>10</sup> *Richard F. Williams*, 55 ECAB 343 (2004).

<sup>11</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 29, 2009 is set aside and remanded for further proceedings consistent with the above opinion.

Issued: January 21, 2011  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board